

LFC Requester:**Caroline Malone**

**AGENCY BILL ANALYSIS
2016 REGULAR SESSION**

WITHIN 24 HOURS OF BILL POSTING, EMAIL ANALYSIS TO:

LFC@NMLEGIS.GOV

and

DFA@STATE.NM.US

{Include the bill no. in the email subject line, e.g., HB2, and only attach one bill analysis and related documentation per email message}

SECTION I: GENERAL INFORMATION

{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}

Check all that apply:

Original X **Amendment**
Correction **Substitute**

Date 1/20/2016

Bill No: SB 91

Sponsor: Sen. Stuart Ingle

Agency Code: 305

Short Uniform Powers of

Person Writing Peggy Jeffers

Title: Appointment Act

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SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY16	FY17		

(Parenthesis () Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY16	FY17	FY18		

(Parenthesis () Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY16	FY17	FY18	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total						

(Parenthesis () Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to: N/A

Duplicates/Relates to Appropriation in the General Appropriation Act

SECTION III: NARRATIVE**BILL SUMMARY**

This analysis is neither a formal Attorney General's Opinion nor an Attorney General's Advisory Letter. This is a staff analysis in response to an agency's, committee's, or legislator's request.

Synopsis:

SB 91 enacts the Uniform Powers of Appointment Act, as well as the Uniform Trust Decanting Act, make technical changes to other statutes, and amends provisions of New Mexico's Uniform Probate Code pertaining to notice, time for presentation of claims, penalty clauses, and closing an estate.

Uniform Powers of Appointment Act

Sections 1-101 through 1-603 of SB 91 comprise the Uniform Powers of Appointment Act. Article 1 (sections 1-101 through 1-104) contains general provisions, including definitions, and governing law. Section 1-102 is a definitions section. It defines "power of appointment" as a power that enables a powerholder acting in a nonfiduciary capacity to designate a recipient of an ownership interest in or another power of appointment over the appointive property.

Pursuant to Section 1-103, unless the terms of the instrument creating the power of appointment manifest a contrary intent, the creation, revocation or amendment of a power of appointment would be governed by the law of the donor's domicile at the relevant time, and the exercise, release or disclaimer of the power would be governed by the law of the powerholder's domicile at the relevant time.

Article 2 (Sections 1-201 through 1-206) deals with creation, revocation and amendment of powers of appointment. Section 1-205 defines a power of appointment as "nongeneral" if the powerholder may exercise it only with the consent or joinder of an adverse party and "exclusionary" if the permissible appointees of the power of appointment are not defined and limited.

Article 3 (Sections 1-302 through 1-314) concerns exercise of a power of appointment. Since one of the requirements for exercise of a power is that the terms of the instrument exercising the power manifest the powerholder's intent to exercise the power and since the instrument exercising the power could be the powerholder's will, Section 1-302 addresses the issue of determining intent from a residuary clause in a will. Among other things, Article 3 also addresses permissible and impermissible appointments and what happens if a permissible appointee is deceased. Sections 1-309 and 1-310 deal with the disposition of

ineffectively appointed property and unappointed property. Section 314 allows a powerholder to revoke or amend an exercise of a power of appointment if certain circumstances are met.

Article 4 (Sections 1-401 through 1-407) deals with disclaimer or release and contracts to appoint or not to appoint. Section 1-401 provides that a powerholder may disclaim all or part of a power of appointment, and a permissible appointee or taker in default of appointment may disclaim all or part of an interest in appointive property. Section 1-403 allows a powerholder of a releasable power to release the power either in accordance with the term of the instrument creating the power, if it provides terms, or if it does not do so or if the terms are not made exclusive, then by a record manifesting the powerholder's intent by clear and convincing evidence. Sections 1-405 and 1-406 allow the holder of a power to contract to exercise or not exercise it, under certain circumstances, whether the power is or is not presently exercisable. Section 1-407 limits the remedy for breach of a contract to appoint or not to appoint appointive property to damages payable out of the appointive property or, if appropriate, specific performance of the contract.

Article 5 (Sections 1-501 through 1-504) deals with the rights of a powerholder's creditors in appointive property. There are some circumstances under which a creditor of the powerholder can reach the appointive property, regardless of whether the powerholder or another person created the general power of appointment. In the case of a powerholder who is not the creator of the power, the power must be presently exercisable. Pursuant to Section 1-504, appointive property subject to a nongeneral power of appointment is exempt from a claim of a creditor of the powerholder or the powerholder's estate. An exception occurs if the powerholder owned the property and, reserving the nongeneral power, transferred the property in violation of the Uniform Voidable Transactions Act (Sections 56-10-14 through 56-10-29, NMSA).

Article 6 (Sections 1-601 through 1-603) contains miscellaneous provisions. Section 1-601, in the context of interpretation of provisions of the Act, stresses the need for promoting uniformity with respect to its subject matter among the states that enact it. With certain exceptions set forth in Section 1-603, the Act applies to powers of appointment created before, on, or after January 1, 2017.

Uniform Trust Decanting Act

SB 91 also enacts the Uniform Trust Decanting Act. Except as otherwise provided, the Uniform Trust Decanting Act applies to Trusts created before, on or after January 1, 2017. It applies to trusts that have their principal places of administration in New Mexico or that provide by their trust instruments that they are governed by New Mexico law, or governed by New Mexico law for the purposes of administration, construction of the trust, or determining the meaning or effect of terms of the trust. Section 2-103 provides that the Uniform Trust Decanting Act does apply to a trust held solely for charitable purposes. Also, a trust instrument can restrict or prohibit decanting.

Among other provisions of SB 91 are some regarding notice to be given of the intended exercise of the decanting power, which pursuant to Section 2-107, must be given to specified interested parties not later than 60 days before the intended exercise.

If the first trust contains a determinable charitable interest, the fiduciary must give notice to the Attorney General. Section 2-114 defines a "determinable charitable interest" as a

charitable interest that is a right to a mandatory distribution currently, periodically, or on the occurrence of a specified event or after the passage of a specified time and that is unconditional or will be held solely for charitable circumstances. If the first trust contains a determinable charitable interest, the second trust or trusts shall not diminish the charitable purpose, diminish the interest of an identified charitable organization that holds the charitable interest, alter any charitable purpose stated in the first-trust instrument, or alter any condition or restriction related to the charitable interest.

Section 2-109 provides that on application of an authorized fiduciary, a person entitled to notice under Section 2-107, including the Attorney General with respect to a charitable interest, may apply to the court to have the court provide instructions to the authorized fiduciary regarding whether a proposed exercise of the decanting power is permitted pursuant to the Act, or to appoint a special fiduciary authorized to determine whether it is. Section 2-113 contains provisions relating to trusts for beneficiaries with a disability and provisions relating to exercise of the decanting power by the fiduciary of a special-needs trust.

There are also provisions relating to change in compensation for a fiduciary (Section 2-116) and tax-related limitations relating to exercise of the decanting power (Section 2-119). These provisions are fairly technical and reference federal laws.

SB 91 also adds a new Section 45-1-403.1 to the Uniform Probate Code. This section addresses who may represent and bind another person. Its provisions include Section 3-107, allowing a person with a substantially identical interest with respect to a particular question or dispute being allowed to represent and bind an otherwise unrepresented minor, incapacitated, or unborn person or a person whose identity or location is unknown and not reasonably ascertainable, to the extent there is no conflict of interest between the representative and the person represented. Section 3-108 allows a court that determines that an interest is not represented under Chapter 45 NMSA 1978, or that the otherwise available representation might be inadequate, to appoint a representative to receive notice, give consent, bind and act on behalf of a minor, incapacitated, or unborn person or a person whose identity or location is unknown and not reasonably ascertainable.

SB 91 also makes what appear to be fairly minor changes in wording to some sections of the Probate Code. It additionally makes changes to the Probate Code that reflect the provisions of the Uniform Power of Appointment Act.

Uniform Statutory Rule Against Perpetuities

Section 3-113 of SB 91 adds material to Section 45-2-904 of the Uniform Statutory Rule Against Perpetuities. Section 3-113 (B) states that for real property held in trust, at the end of 365 years from the later of the date on which an interest in real property is added to or purchased by the trust or the date when the trust becomes irrevocable, if the interest is still held by the trust it shall be distributed, whether or not the trust provides for the distribution of the interest upon termination of the trust. It also contains directions regarding how and to whom the property is to be distributed.

Section 3-113(C) adds an exception to Uniform Statutory Rule Against Perpetuities set forth in Section 45-2-901. A trust shall not become void or subject to termination under Section 45-2-901 or Section 45-9-904 NMSA 1978 if the trust holds an interest in a corporation, a limited liability company, a partnership, a statutory trust, a business trust or another business entity and the entity is the owner of an interest in real property, the entity terminates, and the

trust becomes the holder of an interest in real property.

Other Provisions

Subsection 3-113(D) sets forth actions the trustee that becomes the holder of an interest in real property in accordance with subsection C may take, and Subsection E enumerates exceptions to the term “real property” for the purposes of Section 3-113.

SB 91 changes language in Section 45-3-712 NMSA 1978 to implement gender neutrality. It adds substantive language declaring that a personal representative is liable for breach of fiduciary duty to the same extent as a trustee of an express trust.

SB 91 repeals the existing notice to creditors provisions contained in Section 45-3-801 NMSA 1978 of the Probate Code and substitutes provisions that extend the time for notices to creditors to run in a newspaper of general circulation from once a week for two successive weeks to once a week for three consecutive weeks. This provision, currently contained in Subsection B, moves to Subsection A. The time for a creditor to present claims is enlarged from two months from the first date of publication to four months from the first date of publication.

What is currently Subsection A of Section 45-3-801, regarding written notice by mail or other delivery to a creditor of an estate, moves to Subsection B. It would change from a mandatory to a permissive form of notice. The time for a creditor to present claims is changed from within sixty days after the mailing or delivery of notice or within two months of the published notice, if given, whichever is larger to within two months after the mailing or delivery of notice or within four months of the published notice, if given, whichever is larger.

Section 45-3-905 NMSA 1978, which currently is reserved, is repealed and a new Section 45-3-905 added providing that a clause in a will purporting to penalize any interested person for contesting the will or instituting other proceedings is unenforceable if probable cause exists for instituting the proceedings.

FISCAL IMPLICATIONS

Note: major assumptions underlying fiscal impact should be documented.

Note: if additional operating budget impact is estimated, assumptions and calculations should be reported in this section.

SIGNIFICANT ISSUES

According to the Uniform Law Commission, a power of appointment is an estate planning tool that permits the owner of property to name a third party and give that person the power to direct the distribution of the property among some class of permissible beneficiaries. The American Bar Association states that powers of appointment are among the most commonly-used techniques in estate planning. Despite this fact, little case law and virtually no statutory law governing powers of appointment exists in many United States jurisdictions. As a result, much uncertainty exists in the planning and administration of estates, often leading to costly litigation. Questions that arise include whether the residuary clause of a powerholder's will exercises a general power of appointment; if a power of appointment is ambiguously drafted,

whether the powerholder may give the appointive property to only some of the appointees, omitting others entirely; whether a power of appointment may be exercised in a record that is not a writing; what the difference is between a power of appointment, a fiduciary power, and a power of attorney; when is a contract to exercise a power of appointment enforceable; what the rights of a powerholder's creditors in the appointive property are. In 2013, the Uniform Law Commission published the Uniform Powers of Appointment Act ("UPAA") to provide a well-organized codification that eliminates much of the uncertainty surrounding the answers to these questions.

The Uniform Law Commission states that "decanting" is the term used to describe the distribution of assets from one trust into a second trust, like wine is decanted from the bottle to another vessel. Decanting can be a useful strategy for changing the outdated terms of an otherwise irrevocable trust, but can also be abused to defeat the settlor's intent. The Uniform Trust Decanting Act allows a trustee to reform an irrevocable trust document within reasonable limits that ensure the trust will achieve the settlor's original intent. The uniform act prevents decanting when it would defeat a charitable or tax-related purpose of the settlor.

PERFORMANCE IMPLICATIONS

ADMINISTRATIVE IMPLICATIONS

There would be undetermined administrative implications for the Attorney General's Office due to the notice requirements of Section 2-107 and the provision in Section 2-109 giving the Attorney General standing to enforce charitable interests under the Uniform Trust Decanting Act.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

TECHNICAL ISSUES

As the notice by publication outlined in Section 45-3-801(A) is permissive and the notice by mail or delivery in Section 45-3-801(B) also becomes permissive, this could create the impression that no notice to creditors is required, which may be an unintended result.

OTHER SUBSTANTIVE ISSUES

ALTERNATIVES

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Status quo

AMENDMENTS